STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

GREGORY HAYNES,

Plaintiff-Appellant,

vs.

MICHAEL J. NESHEWAT, individually and in his official capacity, OAKWOOD HEALTHCARE, INC., a Michigan corporation, OAKWOOD HOSPITAL-SEAWAY CENTER, jointly and severally

Defendants-Appellees.

SC No. 129206

Court of Appeals Case No. 249848

Wayne County Circuit Court
Case No. 01-137330-NO

DEFENDANTS-APPELLEES' BRIEF ON APPEAL

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

COUNTER-STATEMENT OF BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction over the instant appeal pursuant to MCR 7.301(A)(2){ TA \l "MCR 7.301(A)(2)" \s "MCR 7.301(A)(2)" \c 4 }. This Court granted Plaintiff-Appellant's Application for Leave to Appeal on January 13, 2006.

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals correctly hold that Plaintiff-Appellant's private relationship as a physician with privileges to practice medicine at Defendant-Appellee Oakwood Hospital – Seaway Center does not invoke the protection of the public accommodations section of the Elliott-Larsen Civil Rights Act?

Plaintiff-Appellant would answer:	No
Defendants-Appellees answer:	Yes
The Court of Appeals answered:	Yes
This Court should answer:	Yes

COUNTER-STANDARD OF REVIEW

The standard of review in a case involving the grant or denial of summary disposition is *de novo*. *See Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998){ TA \l "*Spiek v Dept of Transportation*, 456 Mich 331; 572 NW2d 201 (1998)" \s "Spiek v Dept of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998)" \c 1 }; *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001){ TA \l "*DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43; 631 NW2d 59 (2001)" \s "DiPonio Construction Co, Inc v Rosati Masonry Co, Inc, 246 Mich App 43, 46; 631 NW2d 59 (2001)" \c 1 }. Questions of statutory interpretation are also reviewed *de novo*. *See Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002){ TA \l "*Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002)" \s "Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 62; 642 NW2d 663 (2002)" \c 1 }.

I. INTRODUCTION

Plaintiff-Appellee, Gregory Haynes, M.D. ("Plaintiff"), is not an employee of Oakwood Hospital-Seaway Center ("Seaway") or of Oakwood Healthcare, Inc. (collectively referred to as "Oakwood"). He is a physician with medical staff privileges at Seaway. In his Complaint, Plaintiff set forth claims against Oakwood and three individual defendants under the Elliott-Larsen Civil Rights Act, MCLA 37.2102{ TA \l "MCLA 37.2102" \s "MCLA 37.2102" \c 2 }, *et seq*. ("ELCRA"), as well as for negligence and tortious interference with business relationships and expectancies.[1]

At issue in this appeal is the Court of Appeals' holding concerning Plaintiff's claims under the public accommodations section of the ELCRA. Plaintiff alleges that Defendants engaged in a scheme to damage his private medical practice by "impairing his use of the hospital facilities" through intimidation and threats. He further claims that these actions were racially motivated and thereby violated the public accommodations section of the ELCRA, MCLA 37.2301{ TA \l "MCLA 37.2301" \s "MCLA 37.2301" \c 2 }, *et seq*.

In its opinion, the Court of Appeals held that although Oakwood is undeniably a place of public accommodation in some respects, "the medical staff privileges made available to plaintiff were . . . not 'goods, services, facilities, privileges, advantages, or accommodations' by which defendants constitute a place of public accommodation under section 302 of the ELCRA." (Plaintiff-Appellant's Appendix ("Pl. Appx.") at 125a-130a). Therefore, held the Court, Plaintiff

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[1] Prior to the filing of Defendants' Motion for Summary Disposition, all claims against defendants Brian Peltz and Robert Murray, M.D., were dismissed by stipulation of the parties, leaving two remaining defendants, Oakwood and Michael Neshewat, M.D. (Defendants-Appellees' Appendix ("Def. Appx.") at 5b-8b). By its Opinion and Order dated June 4, 2003, the trial court granted Defendants' Motion for Summary Disposition as to Plaintiff's negligence and tortious interference claims, leaving only the ELCRA claims.

cannot bring a claim under the public accommodations section of the ELCRA. On the basis of this finding, the Court of Appeals reversed the trial court's denial of summary disposition.

The Court of Appeals' opinion is perfectly consistent with the plain meaning of the ELCRA, and this Court should affirm that decision.

II. COUNTER-STATEMENT OF FACTS

A. BACKGROUND

Plaintiff is a physician licensed in the State of Michigan. He has had clinical privileges at, and has been a member of the Medical Staff of Seaway, since approximately 1991. Plaintiff undisputedly is not an employee of Oakwood. The Medical Staff is governed by the Bylaws of the Medical Staff of Seaway Hospital ("Bylaws") and the Oakwood Hospital-Seaway Center Medical Staff Rules & Regulations ("Rules & Regulations"). (Defendants-Appellees' Appendix ("Def. Appx.") at 9b-72b). Under the Bylaws, the Medical Executive Committee of Seaway ("MEC") is authorized to investigate any concerns regarding the practices, case management, record keeping, or any and all other clinical or professional activities of any member of the Medical Staff, including Plaintiff, which affect patient care. (Def. Appx. at 9b-51b).

B. PLAINTIFF IS DISCIPLINED BY THE MEC

On November 21, 2000, the MEC initiated an investigation concerning Plaintiff, encompassing the following four concerns: (1) inappropriate and deficient patient care; (2) unprofessional behavior toward nurses, the Chief of Staff, and the Chief of the Department of Medicine; (3) falsification of medical records; and (4) cumulative deficiencies. (Def. Appx. at 73b-74b). On June 5, 2001, acting on the determination of a specially appointed Ad Hoc Committee, the MEC unanimously found that the charges against Plaintiff were substantiated. (Def. Appx. at 75b-79b).

As a remedial measure, the MEC recommended that Plaintiff take fifteen continuing medical education credits in critical care medicine and that he complete the Internal Medicine Board Review Course. (Def. Appx. at 80b-81b). The MEC also required Plaintiff to consult with an intensivist for each admission to the intensive care unit for a period of one year. (Def. Appx. at 80b-81b). To address his difficulties interacting with nursing and medical staff, the MEC required Plaintiff to undergo an evaluation for anger management. (Def. Appx. at 80b-81b). This corrective action did not have any effect on Plaintiff's privileges to admit and treat patients at Seaway. Plaintiff's privileges were never suspended or revoked.

C. PLAINTIFF APPEALS THE DECISION OF THE MEC

Under Articles II and V of the Bylaws, a physician has the right to appeal any adverse decision of the MEC concerning his clinical privileges. (Def. Appx. at 9b, 29b-33b). On June 29, 2001, Plaintiff invoked his right to appeal the MEC's recommendation of corrective action. (Def. Appx. at 82b). A hearing committee comprised of three of Plaintiff's physician colleagues conducted hearings on August 30, 2001, March 21, 2002, and May 15, 2002, pursuant to Article VI of the Bylaws. In order to support its position, the MEC was required by Article VI, Section 5F of the Bylaws to prove that the charges against Plaintiff were based in fact. (Def. Appx. at 31b). Plaintiff was required to show that the charges lacked any factual basis or that they were arbitrary, unreasonable, or capricious. (Def. Appx. at 31b).

At the hearings, both the MEC and Plaintiff were represented by counsel, and both called and cross-examined witnesses. The hearing committee heard testimony and received exhibits. On May 15, 2002, the hearing committee issued its report and unanimously concluded that the corrective action proposed by the MEC was not arbitrary, unreasonable, or capricious, and affirmed the MEC's corrective action. (Def. Appx. at 83b-84b).

The hearing committee presented its written report to the MEC on July 9, 2002. The MEC approved the decision of the hearing committee to uphold its original determination, and Plaintiff was notified of this action on July 16, 2002. (Def. Appx. at 85b). Pursuant to Article VI, Section 6 of the Bylaws, Plaintiff had fifteen days to appeal this decision. (Def. Appx. at 32b). Plaintiff did not appeal.

D. PLAINTIFF'S LAWSUIT

On October 31, 2001, after only the first of the three hearings discussed above, Plaintiff brought suit against Oakwood, the Chief of Staff (Dr. Michael Neshewat), the Chief Administrative Officer (Brian Peltz), and the Chairman of the Utilization Review & Medical Records Committee (Dr. Robert Murray).[2]

In his four-count Complaint, Plaintiff asserted claims for violation of the ELCRA, tortious interference with business relationships and expectancies, negligence, and civil (ELCRA) conspiracy. As only Plaintiff's claims against Dr. Neshewat and Oakwood under the ELCRA survived Defendants' Motion for Summary Disposition, those claims alone were addressed on appeal.

The basis of Plaintiff's ELCRA and ELCRA conspiracy claims has been a moving target throughout this litigation. Plaintiff's Complaint alleged that Defendants "deprived the plaintiff of the ability and opportunity to fully an [sic] equally utilize the facilities at" Oakwood, that the discipline imposed by the MEC was discriminatory, and that, "[t]hrough the use of excessive charges and administrative hearings, the defendants have harassed the plaintiff in an attempt to discourage him from using the facilities at Oakwood and Seaway[.]" (Pl. Appx. at 35a-36a). In his Brief on Appeal to this Court, Plaintiff concedes that he *is not challenging the denial of any*

[2]Mr. Peltz and Dr. Murray were voluntarily dismissed from this action by stipulation of the parties. (Def. Appx. at 5b-8b).

privilege at the hospital, but instead believes that his private medical practice has been impacted by comments made and action taken by Defendants.

Specifically, Plaintiff now alleges that Dr. Neshewat sought to interfere with Plaintiff's referral relationship with another physician, Dr. Oscar Linares. (Plaintiff's Brief on Appeal at 2-4). Plaintiff apparently alleges that, because of Plaintiff's race (African-American), Dr. Neshewat pressured Dr. Linares to stop referring patients to Plaintiff and, instead, to refer those patients to Dr. Neshewat. (Id.). According to Plaintiff, Dr. Linares allegedly was told by Dr. Neshewat that, should he continue to refer patients to Plaintiff, both he and Plaintiff would "encounter administrative problems with the 'Arab Mafia' that controlled the hospital." (Pl. Appx. at 46a).

E. DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendants moved for summary disposition on January 7, 2003. (Def. Appx. at 86b-142b). Plaintiff filed his Brief in Opposition to Defendants' Motion for Summary Disposition on February 11, 2003. (Pl. Appx. at 4a-40a). Defendants submitted a Reply Brief in Support of their Motion for Summary Disposition on April 23, 2003. (Def. Appx. at 143b-169b).

The trial court, the Honorable John A. Murphy, heard oral argument on Defendants' Motion for Summary Disposition on April 25, 2003. As a result of the arguments advanced by Plaintiff at that hearing, Defendants submitted a Supplemental Brief in Support of their Motion for Summary Disposition on May 2, 2003. (Def. Appx. at 170b-177b).

On June 4, 2003, the trial court issued its Opinion and Order Denying in Part Defendants' Motion for Summary and Granting in Part Defendants' Motion for Summary; Granting Plaintiff's Motion for Entry of Default Judgment; and Denying Defendants' Motion to Set Aside

Default ("Order").[3] (Pl. Appx. at 41a-49a). In its Order, the trial court dismissed Plaintiff's tortious interference and negligence claims in their entirety. (Pl. Appx. at 42a). The trial court did not dismiss Plaintiff's ELCRA and ELCRA conspiracy claims. (Pl. Appx. at 41a-49a).

On June 18, 2003, Defendants timely filed their Motion for Reconsideration of the trial court's June 4, 2003 Order. (Def. Appx. at 178b-220b). The trial court issued an Opinion and Order Denying Defendants' Motion for Reconsideration on June 27, 2003. (Pl. Appx. at 50a-60a).

F. THE COURT OF APPEALS' DECISION

Defendants timely applied for, and were granted, interlocutory review of the trial court's decision on Plaintiff's ELCRA claims. On June 23, 2005, the Court of Appeals issued an unpublished, *per curiam* opinion reversing the trial court's decision. (Pl. Appx. at 125a-135a).

The Court of Appeals held that because a "place of public accommodation" exists only through the provision of goods, services, facilities, privileges, advantages, or accommodations to the public, various other services and privileges that a facility does not provide **to the public** (like a physician's privilege to practice medicine) do not implicate the public accommodations provisions of the ELCRA. (Pl. Appx. at 130a) Therefore, the Court held, although a health facility is certainly a "place of public accommodation" under the ELCRA in some respects, a physician's complaint as to his private medical staff privileges at a hospital does not come within the purview of the public accommodations provisions.

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[3] Based on Dr. Neshewat's alleged failure to file a timely answer, Plaintiff moved for entry of default judgment against Defendant Neshewat. Defendants opposed that motion. Defendants have preserved their right to challenge the trial court's decision granting Plaintiff's Motion for Entry of Default. Because Plaintiff's only claims against Dr. Neshewat are the ELCRA claims at issue in this appeal, a final determination that those claims fail as a matter of law will dispose of those claims as to all defendants, including Dr. Neshewat.

The Court of Appeals specifically rejected Plaintiff's argument that a hospital must be treated as a "place of public accommodation" for **all** purposes:

> We recognize that this Court has treated a hospital as a "place of public accommodation" for purposes of the CRA. *See Whitman v Mercy-Hosp*, 128 Mich App 155, 157-162; 339 NW2d 730 (1983){ TA \l "*Whitman v Mercy-Hosp*, 128 Mich App 155; 339 NW2d 730 (1983)" \s "Whitman v Mercy-Hosp, 128 Mich App 155, 157-162; 339 NW2d 730 (1983)" \c 1 }. However, we did so because the hospital had denied the plaintiff access to the delivery room, a place generally open to the general public, on the basis of the plaintiff's marital status. We noted in that case that "[a] 'place of public accommodation' includes a health institution '*whose * * * services are offered * * * or * * * made available to the public.*'" The instant case is distinguishable because, as we noted earlier, plaintiff's claim concerns medical staff privileges not otherwise available to the public. ***In this context, with regard to contractual relationships with those physicians offered staff privileges by defendants, defendant is not a place of public accommodation because these privileges are not offered or otherwise available to the public.***

(Pl. Appx. at 128a) (first emphasis in original; second emphasis added).

On July 15, 2005, Plaintiff filed a motion for reconsideration of the Court of Appeals' Opinion. On July 21, 2005, the Court of Appeals rejected Plaintiff's motion as untimely. Plaintiff then filed an Application for Leave to Appeal to this Court, which was granted on January 13, 2006.

III. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF CANNOT STATE A CLAIM UNDER THE PUBLIC ACCOMMODATIONS SECTION OF THE ELCRA

1. The Court of Appeals' Interpretation of MCLA 37.2301{ TA \s "MCLA 37.2301" } Is Consistent With the Plain Language of the Statute

In his brief, Plaintiff relies heavily on the arguments set forth by Judge Griffin, the dissenting member of the Court of Appeals panel in this case. Specifically, Plaintiff asserts that the Court of Appeals' Opinion "ignored the plain language" of the ELCRA in concluding that Oakwood is not a "place of public accommodation" as to physicians holding or seeking

privileges to practice medicine. Plaintiff simply is incorrect, and the Court of Appeals' common-sense interpretation of the relevant statutory language gives effect to the obvious legislative intent.

In relevant part, MCLA 37.2301(a){ TA \l "MCLA 37.2301(a)" \s "MCLA 37.2301(a)" \c 2 } defines a "place of public accommodation" as:

> . . . a . . . health . . . facility . . . whose . . . privileges . . . are extended, offered, sold, or otherwise **made available to the public**.

(emphasis added). From this plain language, the Court of Appeals correctly concluded that:

> It is clear under section 301(a) that the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation are only those goods, services, facilities, privileges, advantages, or accommodations which are extended, offered, sold, or otherwise **made available to the public**; that is, it is the fact that these goods, services, facilities, privileges, advantages, or accommodations are available to the public that renders the facility a place of public accommodation. **Conversely and by logical inference from the text, if the goods, services, facilities, privileges, advantages, or accommodations offered by a health facility are not made available to the public, the offering of these things is insufficient to render the facility a place of public accommodation**.

(Pl. Appx. at 128a) (emphasis added).

In considering whether the ELCRA's "public accommodations" section applies to the private relationship between a physician and a hospital, then, the Court of Appeals correctly held that the relevant inquiry is not whether the hospital is a "place of public accommodation" in some respects (which it undoubtedly is). Rather, the relevant inquiry is ***whether the privileges or other advantages Plaintiff seeks are made available to the public***. If they are not, then the hospital cannot be a "place of public accommodation" with regard to those particular privileges or advantages.

From this pivotal understanding, the Court held that, with respect to its private relationships with "those physicians offered staff privileges by defendants, defendant is not a

place of public accommodation because **these privileges are not offered or otherwise available to the public.**" (Pl. Appx. at 128a) (emphasis added). In other words, the relevant statutory language makes clear that, although Oakwood may be a place of accommodation in some respects (i.e., with respect to the treatment of the public seeking access to medical care), it is not a place of public accommodation with respect to its private relationships with the physicians who practice medicine there. Medical staff privileges at Oakwood are not "extended, offered, sold, or otherwise made available to the public." Rather, staff privileges are extended only to licensed physicians and, even then, only when Oakwood – pursuant to its own policies, procedures, and credentialing standards, and in its sole discretion – chooses to extend such privileges to a particular physician. Thus, the Court of Appeals correctly held that such private relationships do not invoke the protections of the ELCRA's public accommodations provisions.

2. The Court of Appeals' Decision Is Supported By Relevant Michigan Precedent

Despite Plaintiff's attempt to persuade the Court otherwise, the Court of Appeals' holding is entirely consistent with prior Michigan Supreme Court, Court of Appeals, and Sixth Circuit decisions.

As the Court of Appeals pointed out, this Court has clearly explained and firmly upheld the distinction between a denial of *access to a place of public accommodation*, and a *distinctly private matter involving such a place.* In *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433; 491 NW2d 545 (1992){ TA \l "*Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433; 491 NW2d 545 (1992)" \s "Kassab v Michigan Basic Property Ins Ass'n, 441 Mich 433; 491 NW2d 545 (1992)" \c 1 }, the plaintiff alleged that the defendant insurance company refused to pay his insurance claim because of his race. Arguing that the insurance company was a place of public accommodation, the plaintiff brought his claim under the public

accommodations provisions of the ELCRA. Affirming the Court of Appeals, this Court held that the matter at issue, i.e., the non-payment of a claim, did not fall within the public accommodations protections, because "[t]he focus . . . of that section of the Civil Rights Act is primarily on *denial of access* to a place of public accommodations or public services." *Id.* at 439 (emphasis in original). Indeed, access is the "public accommodation" specified in the statute.[4] The *Kassab* court continued:

> Because access to insurance coverage was not denied, the majority of the court is of the opinion that it is beyond the legislative purpose to provide a civil rights action under the public accommodations section of the act for breach of contract in claims processing. **Upon the issuance of a policy of insurance, the services owed by an insurer to an insured are no longer "services . . . made available to the public." The rights and obligations of the contracting parties are then private.** While an insured is not separated from the "public" upon entering into insuring agreements embodied in a policy of insurance, the obligations of the insurer are owed to a particular contracting party/insured. The rights and obligations of the contracting parties are specific to the contract and to the persons involved.

Id. at 440-41 (emphasis added). Thus, a cause of action under the public accommodations section of the ELCRA will not lie when the "accommodation" complained of is not "public."[5]

In *Fair v Prime Security Distributors, Inc*, 134 F3d 371 (CA6 1997) (Def. Appx. at 221b-225b){ TA \l "*Fair v Prime Security Distributors, Inc*, 134 F3d 371 (CA6 1997) (Def. Appx. at

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[4] In his Brief on Appeal, Plaintiff argues that the "**access** requirement added to the state's CRA statute is new." (Plaintiff's Brief on Appeal at 11). Nothing could be further from the truth. As an initial matter, contrary to what Plaintiff would have this Court believe, the cases he cites do not establish that "access" is somehow different from "full and equal enjoyment" within the meaning of the public accommodations section of the ELCRA. Moreover, Plaintiff's argument on this issue demonstrates just how fundamentally he misunderstands the inquiry. The issue is not whether the statute prohibits denial of access to or the full and equal enjoyment of the privileges of a place of public accommodation; rather, the crucial issue is what privileges of a place of public accommodation are made available to the public and, thus, must be offered in such a manner so as to allow for either equal access or full and equal enjoyment.

[5] *See also Diamond* v *Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005){ TA \l "*Diamond* v *Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005)" \s "Diamond v Witherspoon, 265 Mich App 673; 696 NW2d 770 (2005)" \c 1 }. The *Diamond* court reiterated that "the focus of § 2302 of the CRA, MCLA 37.2302{ TA \l "MCLA 37.2302" \s "MCLA 37.2302" \c 2 }, is 'on *denial of access* to a place of public accommodations or public services.'" *Id.* at 687.

221b-225b)" \s "Fair v Prime Security Distributors, Inc, 134 F3d 371 (CA6 1997) (Def. Appx. at 221b-225b)" \c 1 }, the Sixth Circuit applied the same reasoning in rejecting the plaintiff's claim for race discrimination under the public accommodations section of the ELCRA. In that case, the plaintiff claimed that the defendant discriminated against him by not renewing the parties' dealership contract because of the plaintiff's race. In affirming dismissal of the plaintiff's claim under the ELCRA's public accommodations provisions, the court explicitly recognized that, "**The Michigan Supreme Court has already explained that the focus of that prohibition is primarily upon a denial of access to places of public accommodations or public services.**" *Fair*, *supra* at *3 (emphasis added), *citing Kassab{* TA \s "Kassab v Michigan Basic Property Ins Ass'n, 441 Mich 433; 491 NW2d 545 (1992)" *}, supra,* at 439, 441. (Def. Appx. at 224b).

In this case, Plaintiff has not alleged that he has been denied access to Oakwood, or the benefit of any goods or services that are made available **to the public** at Oakwood. Instead, Plaintiff takes issue with the actions of an agent of Oakwood that, at best, purportedly impacted his private medical practice at the hospital. Simply, such claims do not implicate the public accommodations provisions of the ELCRA.

In keeping with this general principle, the Michigan Court of Appeals has on several occasions rejected the very theory posited by Plaintiff in this case. In *Ravikant v William Beaumont Hosp*, unpublished opinion *per curiam* of the Court of Appeals, decided September 30, 2003 (Docket No. 238911){ TA \l "*Ravikant v William Beaumont Hosp*, unpublished opinion *per curiam* of the Court of Appeals, decided September 30, 2003 (Docket No. 238911)" \s "Ravikant v William Beaumont Hosp, unpublished opinion per curiam of the Court of Appeals, decided September 30, 2003 (Docket No. 238911)" \c 1 } (Def. Appx. at 226b-232b), the plaintiff physician alleged that his privileges to practice medicine at the defendant hospital had

been restricted because of his race in violation of the public accommodations section of the ELCRA. In rejecting the same argument made by Plaintiff in this case, namely that he had been denied the full and equal enjoyment of privileges by a place of public accommodation, the Court of Appeals held:

> As defendant notes, defendant is a public accommodation for the general public to receive medical care, but it is not a place of general accommodation for the medical profession to practice medicine.

Id. at *7. (Def. Appx. at 231b). Thus, the Court of Appeals correctly concluded that the plaintiff had failed to state a claim under the public accommodations section of the ELCRA based on the alleged discriminatory restrictions placed on his medical staff privileges.

Similarly, in *Foust v Saginaw Cooperative Hospitals, Inc,* unpublished opinion *per curiam* of the Court of Appeals, decided September 30, 2003 (Docket No. 238762){ TA \l "*Foust v Saginaw Cooperative Hospitals, Inc,* unpublished opinion *per curiam* of the Court of Appeals, decided September 30, 2003 (Docket No. 238762)" \s "Foust v Saginaw Cooperative Hospitals, Inc, unpublished opinion per curiam of the Court of Appeals, decided September 30, 2003 (Docket No. 238762)" \c 1 } (Def. Appx. at 233b-234b), the Court of Appeals again drew a distinction between protected access to or enjoyment of a place of public accommodation and a purely private relationship that an individual might have with a place of public accommodation. In *Foust{* TA \s "Foust v Saginaw Cooperative Hospitals, Inc, unpublished opinion per curiam of the Court of Appeals, decided September 30, 2003 (Docket No. 238762)" *}*, the plaintiff was a resident physician working under contract with the defendant hospital. When the hospital failed to renew his contract, the plaintiff alleged that the decision was the result of disability discrimination under the Michigan Persons With Disabilities Civil Rights Act ("PWDCRA").[6]

[6] Notably, the definition of "public accommodation" under the PWDCRA is virtually identical to the definition now at issue under the ELCRA. *Compare* MCLA 37.1301(a){ TA \l

Like Haynes, the *Foust*{ TA \s "Foust v Saginaw Cooperative Hospitals, Inc, unpublished opinion per curiam of the Court of Appeals, decided September 30, 2003 (Docket No. 238762)" } plaintiff relied on the public accommodations provisions of the applicable statute. In affirming the dismissal of the plaintiff's claim, the Court of Appeals held that the hospital's decision not to renew the plaintiff's contract did not invoke the protections of the public accommodations provisions of that Act, saying:

> Although defendant is clearly a place of public accommodation, the trial court still correctly granted summary disposition with respect to this aspect of plaintiff's PWDCRA claim because plaintiff failed to establish that defendant, as a "place of public accommodation," denied him the "full and equal enjoyment of the . . . facilities." MCLA 37.1302(a){ TA \l "MCLA 37.1302(a)" \s "MCLA 37.1302(a)" \c 2 }. In short, plaintiff has not alleged that he was unable to access areas of the hospital because of his [disability]. Consequently, the trial court properly granted summary disposition to defendant.

Foust{ TA \s "Foust v Saginaw Cooperative Hospitals, Inc, unpublished opinion per curiam of the Court of Appeals, decided September 30, 2003 (Docket No. 238762)" }, *supra,* at *1. (Def. Appx. at 233b). Simply, the hospital's decision in *Foust*, even if motivated by discriminatory animus, affected its distinctly private relationship with the plaintiff physician, and it did not impact the plaintiff's access to any services, privileges, or advantages of the hospital that were "extended, offered, sold or otherwise made available to the public." The same is true on the facts of this case.

Finally, in *Watkins v Hutzel Hospital*, unpublished opinion *per curiam* of the Court of Appeals, decided May 4, 1999 (Docket No. 205370) (*lv den*, *Watkins v Hutzel Hosp*, 461 Mich 1003 (2000){ TA \l "*Watkins v Hutzel Hospital*, unpublished opinion *per curiam* of the Court of Appeals, decided May 4, 1999 (Docket No. 205370) (*lv den*, *Watkins v Hutzel Hosp*, 461 Mich 1003 (2000)" \s "Watkins v Hutzel Hospital, unpublished opinion per curiam of the Court of

"MCLA 37.1301(a)" \s "MCLA 37.1301(a)" \c 2 } with MCLA 37.2301(a){ TA \s "MCLA 37.2301(a)" }.

Appeals, decided May 4, 1999 (Docket No. 205370) (lv den, Watkins v Hutzel Hosp, 461 Mich 1003 (2000)" \c 1 }) (Def. Appx. at 212b-214b), the plaintiff physician alleged that she was discriminatorily denied hospital privileges because of her alleged disability in violation of the public accommodations section of the Michigan Handicappers' Civil Rights Act ("MHCRA"), MCLA 37.1201{ TA \l "MCLA 37.1201" \s "MCLA 37.1201" \c 2 } et seq. The Court of Appeals refused to consider the plaintiff's claim under the public accommodations section of the MHCRA.[7] In the words of the court in that case:

> Plaintiff brought this action under the public accommodation section of the MHCRA. As a health facility, defendant is a place of public accommodation under the Act. However, a physician seeking staff privileges is more analogous to an employee seeking employment than to a handicapped person seeking equal opportunity to utilize public facilities.

Id. at *1, n 1 (internal citations omitted). For this reason, the Court of Appeals concluded that the plaintiff had failed to state a claim under the public accommodations section of that statute.

Thus, there is a wealth of Michigan case law supporting the conclusion reached by the Court of Appeals in this case, and this Court should affirm its decision that Plaintiff has failed to state a claim under the public accommodations section of the ELCRA.[8]

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[7] As the trial court in this case noted, "*Watkins*{ TA \s "Watkins v Hutzel Hospital, unpublished opinion per curiam of the Court of Appeals, decided May 4, 1999 (Docket No. 205370) (lv den, Watkins v Hutzel Hosp, 461 Mich 1003 (2000)" } was decided under the Michigan Handicappers' Civil Rights Act, MCLA 37.1101{ TA \l "MCLA 37.1101" \s "MCLA 37.1101" \c 2 } *et seq.* But, for purposes relevant to the instant motion, the Handicappers' Act is identical to Elliott-Larsen." (Pl. Appx. at 53a).

[8] Plaintiff's efforts to distinguish the authority cited by Defendants are unpersuasive, and his significant reliance on *Doe v Dept of Corrections*, 240 Mich App 199; 611 NW2d 1 (2000){ TA \l "*Doe v Dept of Corrections*, 240 Mich App 199; 611 NW2d 1 (2000)" \s "Doe v Dept of Corrections, 240 Mich App 199; 611 NW2d 1 (2000)" \c 1 }, and *Neal v Dept of Corrections*, 232 Mich App 732; 592 NW2d 370 (1998){ TA \l "*Neal v Dept of Corrections*, 232 Mich App 732; 592 NW2d 370 (1998)" \s "Neal v Dept of Corrections, 232 Mich App 732; 592 NW2d 370 (1998)" \c 1 }, is misplaced. Plaintiff cites these cases for the proposition that a "special panel specifically rejected the claim that protection under Elliott-Larsen only extended to the general public, and to entities serving the general public." (Plaintiff's Brief on Appeal at 20-21). These cases have no bearing on this dispute. *Doe* and *Neal* represent a lengthy debate regarding the

3. The Court of Appeals' Opinion is Consistent With Decisions from Other Jurisdictions

Also instructive are decisions from other courts which agree with this common-sense distinction between the public and private aspects of a given business enterprise. For example, in *Samuels v Rayford*, 1995 WL 376939 (DDC April 10, 1995){ TA \l "*Samuels v Rayford*, 1995 WL 376939 (DDC April 10, 1995)" \s "Samuels v Rayford, 1995 WL 376939 (DDC April 10, 1995)" \c 1 } (Def. Appx. at 193b-200b), the court considered a similar issue arising under the District of Columbia Human Rights Act ("DCHRA") and concluded that a hospital could be a "place of public accommodation" for some purposes, but not for others. In that case, as in the instant case, the plaintiff, an African-American physician, alleged that when the defendant hospital revoked her staff privileges, it violated the public accommodations section of the DCHRA. In holding that the hospital was not a "place of public accommodation" for purposes of the grant or denial of medical staff privileges, the court made the following comments which are highly instructive on our facts:

> Dr. Samuels also bases her DCHRA claim on the 'in places of public accommodation' category of protected activity. A hospital is undeniably a place of public accommodation in its dealings with its patients and their visitors. Defendants argue, however, that [the hospital] is very selective in making determinations regarding which doctors will be awarded privileges to practice medicine there. Because members of the medical community – not to mention members of the general public – cannot practice medicine at [the hospital] without approval, defendants contend that [the hospital's] relationship with its doctors is 'distinctly private in nature' and, therefore, not covered by the DCHRA.
>
> The Court agrees that [the hospital] is not a 'place of public accommodation' with regard to its relationship with its doctors.

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application of the ELCRA's "**public service**" provisions to prisoners incarcerated in our state correctional facilities. The debate centered on whether prisons are places of "**public service**" for the prisoners that they house. The cases had nothing to do with places of "public accommodation" or any other issues before this Court.

* * *

> **A hospital . . . which is highly selective in granting privileges to doctors to practice there, does not meet this definition [of a place of public accommodation] in its relationship with its doctors. Although it is a 'place,' it is 'distinctly private' in its selection of those granted privileges to practice medicine there. Because the relationship between [the hospital] and Dr. Samuels was not one shared with the public generally, plaintiff's claim is not properly asserted under the 'place of public accommodation' category of the DCHRA.**

Samuels{ TA \s "Samuels v Rayford, 1995 WL 376939 (DDC April 10, 1995)" }, 1995 WL 376939 at *7-8 (internal citations omitted) (emphasis added). (Def. Appx. at 197b-198b).

The reasoning of the *Samuels*{ TA \s "Samuels v Rayford, 1995 WL 376939 (DDC April 10, 1995)" } court is equally applicable on the facts of this case. Like the hospital in *Samuels*, Oakwood may in fact be a "place of accommodation" with regard to its dealings with patients and visitors, but it is not a place of public accommodation with regard to its private relationships with the physicians who practice medicine at the hospital.

Also instructive is *Bauer v Muscular Dystrophy Ass'n, Inc*, 268 F Supp 2d 1281 (D Kan 2003){ TA \l "*Bauer v Muscular Dystrophy Ass'n, Inc*, 268 F Supp 2d 1281 (D Kan 2003)" \s "Bauer v Muscular Dystrophy Ass'n, Inc, 268 F Supp 2d 1281 (D Kan 2003)" \c 1 } (Def. Appx. at 235b-247b), where the court considered whether the plaintiffs had stated a claim under the public accommodations section (Title III) of the Americans with Disabilities Act ("ADA"). In that case, the plaintiffs, who were disabled within the meaning of the ADA, were not allowed to volunteer at summer camps run by the Muscular Dystrophy Association ("MDA") because of the MDA's policy requiring volunteers to be able to lift and care for campers. Because the plaintiffs were not MDA employees within the meaning of the ADA, they brought suit under the public accommodations section of that statute, claiming they had been denied the "services, facilities, privileges, and advantages" of a public accommodation in violation of Title III of the ADA.

Although conceding that the MDA summer camp was a "place of public accommodation" in some respects, the court rejected the plaintiffs' argument that it was a place of public accommodation with respect to the plaintiffs, saying:

> As the court noted previously in this case, plaintiffs' complaint about being prevented from working as volunteers at the camp more closely resembles an employment situation of the type addressed by Title I of the ADA than it does the typical denial of services or privileges at a place of public accommodation addressed in Title III. After considering the framework of the ADA in light of the particular claims and the evidence in this case, the court concludes that the plaintiffs are not individuals who have been denied the "enjoyment" of the "goods, services, facilities, privileges, advantages, or accommodations" of a place of public accommodation within the meaning of Title III of the ADA. Even assuming that Wichita District's MDA Summer Camp can be classified as a place of public accommodation, the right of equal access to the "goods, services and facilities," et cetera, guaranteed by Title III is most reasonably construed to mean the goods, services and facilities *offered to customers or patrons* of the public accommodation, not to individuals who work at the facility, whether those workers be paid employees, independent contractors, or unpaid volunteers.
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> * * *
>
> . . . individuals who work at places of public accommodation, and who would perform tasks for and under the direction and control of an owner or operator of a public accommodation, are not "clients or customers" of the public accommodation.
>
> * * *
>
> Expanding Title III's coverage by applying it to individuals who perform work on behalf of a place of public accommodation would largely obliterate the framework of Title I – including the exceptions and exemptions from coverage embodied in Title I.

Id. at 1290-92 (emphasis in original). (Def. Appx. at 243b-245b).

The *Bauer{*TA \s "Bauer v Muscular Dystrophy Ass'n, Inc, 268 F Supp 2d 1281 (D Kan 2003)" *}* court's analysis of this issue, and its conclusion that an entity may be considered a place of public accommodation for only certain limited purposes, is equally instructive on the facts of this case. It is quite logical to conclude that, like the MDA summer camp at issue in *Bauer*, Oakwood is a "place of public accommodation" with respect to patients and visitors seeking

access to its services, but not as to physicians who, by private right or agreement, are permitted to practice medicine at the hospital.

Recently, another federal district court has had occasion to consider a claim similar to that raised by Plaintiff in this case. In *Wojewski v Rapid City Regional Hosp, Inc,* 394 F Supp 2d 1134 (DSD 2005){ TA \l "*Wojewski v Rapid City Regional Hosp, Inc,* 394 F Supp 2d 1134 (DSD 2005)" \s "Wojewski v Rapid City Regional Hosp, Inc, 394 F Supp 2d 1134 (DSD 2005)" \c 1 } (Def. Appx. at 248b-259b), the plaintiff physician alleged, in relevant part, that the defendant hospital terminated his medical staff privileges because of his disability in violation of the public accommodations section of the ADA. Like Defendants in this case, the defendant hospital argued that the plaintiff was not denied any privilege or service made available to the public. Relying on the reasoning set forth in *Bauer{* TA \s "Bauer v Muscular Dystrophy Ass'n, Inc, 268 F Supp 2d 1281 (D Kan 2003)" *}*, the *Wojewski{* TA \s "Wojewski v Rapid City Regional Hosp, Inc, 394 F Supp 2d 1134 (DSD 2005)" *}* court concluded that the plaintiff's public accommodations claim failed because he was not a client or customer of the hospital.

Plaintiff's efforts to distinguish this line of cases are inapposite to the issue for which they are cited — namely, that actions brought under provisions prohibiting discrimination in the provision of goods and services by a place of public accommodation are limited to situations in which a plaintiff has been denied equal access to some aspect of that enterprise that is made available **to the public.** Likewise, plaintiff's reliance on *Menkowitz v Pottstown Memorial Medical Center*, 154 F3d 113 (CA3 1998){ TA \l "*Menkowitz v Pottstown Memorial Medical Center*, 154 F3d 113 (CA3 1998)" \s "Menkowitz v Pottstown Memorial Medical Center, 154 F3d 113 (CA3 1998)" \c 1 }, is misplaced. *Menkowitz* is not binding precedent, and its reasoning was properly rejected by the Court of Appeals in this case, as well as the *Bauer{* TA \s "Bauer v

Muscular Dystrophy Ass'n, Inc, 268 F Supp 2d 1281 (D Kan 2003)" } and *Wojewski{* TA \s "Wojewski v Rapid City Regional Hosp, Inc, 394 F Supp 2d 1134 (DSD 2005)" } courts. In sum, the conclusion reached by the Court of Appeals is well-supported by the plain language of the statute, relevant Michigan case law, and decisions from other jurisdictions. Plaintiff's attempts to demonstrate otherwise simply are not persuasive.

4. Public Policy Considerations Compel The Conclusion Advanced by Defendants

In addition to being consistent with existing Michigan precedent and instructive decisions from other courts, as well as simple common sense, the Court of Appeals' well-reasoned decision in this case also prevents Plaintiff and others from making an end-run around the clear legislative intent and plain statutory language of the ELCRA. Under the theory advanced by Plaintiff, any independent contractor or other non-employee could proceed with an ELCRA claim, so long as he or she happened to be performing services for an entity that provides goods or services to the public. Such a claim would be in direct contravention of the ELCRA and well-settled precedent. *See, e.g., Seabrook v Michigan National Corp*, 206 Mich App 314; 520 NW2d 650 (1994) (independent contractors and other individuals who are not employees may not bring a claim under the ELCRA).{ TA \l "*Seabrook v Michigan National Corp*, 206 Mich App 314; 520 NW2d 650 (1994)." \s "Seabrook v Michigan National Corp, 206 Mich App 314; 520 NW2d 650 (1994)." \c 1 } Following Plaintiff's logic, these long-standing and well-recognized limitations could be circumvented in any case where the individual happened to be performing services for a business or enterprise that was, in some respect, a place of public accommodation which, obviously, can be said of nearly every business or enterprise.

5. Defendants Did Not Waive Their Right To Appeal as to Plaintiff's Conspiracy Claim

Plaintiff's argument that Defendants waived their right to appeal the trial court's decision on his ELCRA conspiracy claim is completely unfounded and warrants only a brief response. Obviously, Plaintiff's civil conspiracy claim is predicated on a claim for discrimination in violation of the ELCRA. It follows, then, that the legal issue on appeal is determinative of both claims: if there is no viable claim for discrimination under the public accommodations section of the ELCRA, then there can be no claim of conspiracy to violate the ELCRA on the same facts. Thus, Defendants have not waived their right to appeal the trial court's decision regarding Plaintiff's conspiracy claim.

IV. CONCLUSION

For the reasons set forth herein, Defendants respectfully request that this Court affirm the Court of Appeals' Opinion reversing the denial of summary disposition to Oakwood and Dr. Neshewat as to Plaintiff's ELCRA claims, grant Defendants' Motion for Summary Disposition, and remand the case to the Wayne County Circuit Court with direction for entry of an order of dismissal of all claims with prejudice.

Dated: April 24, 2006

Respectfully submitted,

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